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Nos. 09-987, 09-988, 09-991

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IN THE

Supreme Court of the United States

ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION, et al.,
Petitioners,

—v.—

KATHLEEN M. WINN, et al.,
Respondents.

ARIZONA SCHOOL CHOICE TRUST, et al.,
Petitioners,

—v.—

KATHLEEN M. WINN, et al.,
Respondents.

GALE GARRIOTT, in his official capacity as Director of the Arizona Department of Revenue,
Petitioner,

—v.—

KATHLEEN M. WINN, et al.,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the complaint in this case, which alleges pervasive religious discrimination in awarding scholarships in Arizona's unusual tax-credit school-voucher program, states a claim upon which relief can be granted.

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STATEMENT OF THE CASE

Introduction

We emphasize at the outset that Arizona's program is quite unlike tax-credit or school voucher programs in other states, and also unlike the program upheld by the Court in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the case on which petitioners and their *amici* principally rely. Unlike those programs, the Arizona program uses religious organizations to award most of its scholarships, and it permits those organizations to require that parents enroll their children at religious schools in order to receive state scholarship aid. That pervasive religious discrimination in the way scholarships are awarded - - a feature unique to the Arizona program - - is the basis of respondents' case.

In *Zelman*, the state issued tuition vouchers to parents of children living in a public school district whose schools had been "among the worst performing . . . in the Nation." 536 U.S. at 644. The vouchers were issued on the basis of financial need. The purpose of the *Zelman* program was to give children from low-income families the chance to escape a failed public-school system. The program was upheld because it served this important secular purpose, because it was, in design and operation, "entirely neutral with respect to religion," and because it gave parents receiving vouchers the unfettered right to choose the school at which to use the voucher. 536 U.S. at 649-650, 653, 662.

The Arizona program is different in every one of these respects. If the allegations in respondents' complaint are taken as true, as they must be at this stage of the case, the Arizona program is neither based on financial or academic need nor neutral with respect to religion. Instead, it awards most of its scholarships to the children of middle-class and wealthy parents on the *basis* of religion. Most parents who receive Arizona program scholarships, moreover, have no choice about where to use them, because most scholarships can only be used at specific religious schools. We are aware of no program in any other state that contains these unconstitutional features.

The court of appeals has held that respondents' factual allegations state a claim under the Establishment Clause, and that respondents should be given an opportunity to prove the truth of their allegations. No temporary or preliminary injunctive relief has been requested or given. This completely unexceptionable decision does not conflict with the decision of any other federal court of appeals or with the decision of any state supreme court. Because it is based on features unique to the Arizona program, the decision below does not call into question the constitutionality of programs in other states. The decision is, in addition, clearly correct. The petitions for certiorari should be denied.

The Arizona Program

Tax-related school-choice programs ordinarily permit *parents* to claim tax credits or tax deductions for their own educational expenses on behalf of their children - - expenses such as tuition, the cost of books

and supplies, and transportation costs. Programs of that kind offer all parents who send their children to non-public schools the opportunity to defray some of those educational expenses.

Arizona's tax-credit program is completely different. Arizona tax credits do not permit parents with children in non-public schools to defray some or all of their costs for private education. Parents with children in religious or private schools are actually *forbidden* by the Arizona statute to claim tax-credits for their own educational expenses. Ariz. Rev. Stat. Ann. (A.R.S.) § 43-1089(E). (The text of § 1089 is reproduced on pages 112a-115a of the Petition in 09-987.) The parents who benefit from Arizona's program are those relatively few who are fortunate enough to be chosen to receive scholarships by one of Arizona's "school tuition organizations" (STOs) - - non-governmental organizations that the state has authorized to award the program's scholarships on the state's behalf.

Arizona scholarships are funded through a system of state income-tax credits that are given for "contributions" that taxpayers make to STOs. These credits can be used by *any* Arizona individual income-tax payer, regardless of whether the taxpayer is a parent with children in school or has any educational expenses whatsoever. A.R.S. § 43-1089(A). The Arizona credits are not tax deductions that require the taxpayer to make a contribution of his or her own funds for a charitable purpose. They are dollar-for-dollar tax credits that taxpayers can use to satisfy up to $500 or $1,000 (depending upon whether single or married) of their annual state individual-income-tax

liability. *Id.* The credits cost the taxpayers who use them nothing; the cost of the credits is borne entirely by the state's general fund. The Arizona program is therefore not a program of private taxpayer charity. It is a program that uses state revenues for a state purpose, at no cost to the taxpayers whose use of the credits finances the program.

The Arizona school tuition organizations that receive tax-credited payments from taxpayers are required by statute to use them to award scholarships that are usable only at non-public schools. A.R.S. § 43-1089(G)(2-3). STOs are private organizations, now about 50 in number, that have been established, pursuant to the Arizona program, for the purpose of making scholarship awards from the tax revenues that they receive directly from taxpayers on the state's behalf. *Id.* The STOs that award most of Arizona's scholarships are religious organizations. See Petition in 09-988 at App. 221-App. 222.

Having chosen to use non-governmental organizations, rather than a state agency, to award scholarships from state funds on its behalf, the Arizona Legislature might have been expected to establish scholarship standards that would further its purported educational purposes - - standards requiring that aid be given to children from low-income families, for example, or to children who are not being adequately served by the public school system. The Arizona program contains no such standards. Arizona STOs are free to - - and do - - award scholarships on any basis they choose. The result is that a majority of children who receive Arizona program scholarships are children of middle class or wealthy families - - children

who were already attending private or religious school when the state scholarship was first awarded to them. See Lucas, *The Arizona Scholarship Tax Credit*, Goldwater Institute Policy Report No. 186 (Dec. 11, 2003). (The Goldwater Institute has filed an *amicus* brief in support of the Petition in 09-988.)

Arizona STOs are not prohibited from awarding scholarships on the basis of religion or sex. These are discriminations in which the state would, of course, be forbidden to engage if it awarded the scholarships itself. The Arizona statute prohibits schools that scholarship students attend from discriminating "on the basis of race, color, handicap, familial status or national origin." A.R.S. § 43-1089(G)(2). That provision, however, was intentionally drafted so as not to prohibit the schools from discriminating on the basis of religion or sex in selecting students. The Arizona statute also permits the schools that scholarship students attend to require scholarship students participate in worship services, to take classes in religion, and to participate in all the other religious activities required of non-scholarship students.

Religious schools and organizations have aggressively and openly taken advantage of the Arizona program to further their religious educational goals. The web site of intervenor Arizona Christian School Tuition Organization (ACSTO), for example, describes ACSTO's goal as being "to further Christian education by effectively implementing the provisions of this law for the benefit of Christian school students and their families." ACSTO, acsto.org (last visited Apr. 20, 2010) The web site urges taxpayers "looking for new ways to support Christian education" to do so by

"taking advantage of Arizona's unique opportunity to receive a dollar-for-dollar credit against their Arizona state income tax." *Id.* The web site of the Jewish Tuition Organization (JTO), which has filed an *amicus* brief in support of the petitions in this case, explains that, "[w]ith Arizona's scholarship tax credit you can send children to our community's Jewish day schools and it won't cost you a dime![1] When you support the Jewish Tuition Organization, you receive a dollar-for-dollar tax credit up to $1,000 if you are married or $500 if you are single. Best of all, your donation provides [an] outstanding secular and Jewish education to children who would otherwise be unable to attend a Jewish day school." JTO, jewishphoenix.org (last visited Apr. 20, 2010). The Chabad Tuition Org. (CTO) web site asks taxpayers to "imagine giving Tzedakah [charity] with someone else's money. . . . Stop imagining, thanks to Arizona's laws you can!" CTO, chabadaz.com (last visited Apr. 20, 2010). The web sites and mailings of the other Arizona religious STOs contain identical or similar assertions that Arizona law has been designed to let parishioners and others pay for other people's children to attend religious schools at the state's expense.

STO scholarships must allow children "to attend any qualified school of their parents' choice." A.R.S. § 43-1089(G)(3). That language, on its face, would seem to prohibit religious STOs from awarding scholarships

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[1] Although telling taxpayers that "contributions" to JTO "won't cost you a dime," JTO's *amicus* brief nevertheless argues here that the decision below "erred in suggesting that '[a] tax-credit eligible contribution to an STO costs the taxpayer nothing.' " JTO brief, p. 12, n. 7.

that are usable only at religious schools. Section 43-1089(G)(3) also requires, however, that STOs "shall provide educational scholarships or tuition grants to students without limiting availability to only students of one school." Apparently relying on this additional language, the Arizona Department of Revenue has, from the outset of the program, allowed religious STOs to award scholarships that can only be used in religious schools. Religious STOs take full advantage of this permission.

Respondents filed their complaint in this case after data about the first calendar year of full operation of the Arizona program became available. That data showed that 94% of the tax-credited funds that year was contributed to religious STOs that awarded scholarships usable only at religious schools. See Respondents' Complaint, ¶ 15, Petition in 09-987 at 120a. The Arizona program has increased enormously in size since then, with a corresponding increase in scholarships usable only at religious schools. In 2008, the last year for which data was available at the time this brief was written, more than $55 million in tax credits was claimed for taxpayer payments to STOs. See Arizona Department of Revenue, *Individual Income Tax Credit for Donations to Private School Tuition Organizations: Reporting for 2008*, Executive Summary.[2] Most of this money went to STOs that will use it toward scholarships that can only be used at religious schools.

The STO receiving and awarding the most tax-

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[2] *Available at* azdor.gov/portals/o/reports/private-school-tax-credit-report-2008.pdf.

credited funds in 2008 was intervenor ACSTO. It received more than $11.5 million and awarded almost $11 million in scholarships. *Id.* at 8. Those scholarships can be used only at Christian schools. The second largest STO recipient was the Catholic Tuition Organization of the Diocese of Phoenix. It received more than $9 million and awarded more than $10 million in scholarships. Those scholarships can only be used at Diocese schools. *Id.* These two religiously-affiliated STOs together received and awarded almost 40% of the Arizona program's scholarship funds in 2008. Other religiously affiliated STOs received and awarded at least an additional $15 million. Because the large majority of state scholarship funds is thus controlled by STOs that award scholarships usable only at religious schools, "parents choosing to send their children to non-religious, non-public schools may be unable to locate an STO willing to make a tuition grant to a student attending the non-religious school of the parents' choice." Complaint, ¶ 26, Petition in 09-987 124a.

Other aspects of the Arizona program reinforce both its lack of religious neutrality and its failure to serve the secular purposes for which it was supposedly enacted. The program, for example, permits taxpayers to designate students as scholarship recipients when they make "contributions" to STOs (so long as the designee is not the taxpayer's dependent). See A.R.S. § 43-1089(E). With STO cooperation, affluent taxpayers use this feature of the program to "swap" contributions so that the state will pay part of their children's religious-school tuition. Two sets of parents will each make a "contribution" to an STO and designate that

payment as tuition for the other parents' child. As a result, the state pays religious-school tuition for both children. Parents with children in religious school can similarly ask relatives and friends to make "contributions" to a religious STO and to designate those amounts for their child, so that the state pays part or all of their child's tuition. Complaint ¶¶ 27-28.

The failure of the Arizona program to serve its purported secular purposes is not a secret. Two newspapers - - the Arizona Republic, the state's largest newspaper, and the East Valley Tribune - - have each recently published a comprehensive series of investigative articles about the program's failing operation.[3] Here is a sample of what these investigative articles describe:

> • In operation, the Arizona program displays "lack of oversight, double-dipping into state funds, manipulating the system for personal and . . . financial gain, and failure to benefit the poor." Ronald J. Hansen & Pat Kossan, *The Tuition Tax Credit: Tuition aid Benefits Wealthy Families, Raises Worry*, Ariz. Republic, Aug. 1, 2009, azcentral.com.
>
> • The executive director of an STO that received more than $6 million in contributions in 2008 said that "about 70

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[3] The full series of Arizona Republic articles is available at azcentral.com, using the search phrase "the tuition tax credit.". The East Valley Tribune series can be found at www.eastvalleytribune.com/page/taxcredits.

percent of her scholarships in 2008 went to those who are not considered low-income and at least 9 percent [to] those who could be considered wealthy." Overall, her organization targets the middle class. "That's who we cater to . . . I would be very disappointed to see a (low-income) group as a target." *Id.*

• In a 2003 survey, the Goldwater Institute, a conservative think tank that has filed an amicus brief in this case and that has ties to intervenor Arizona School Choice Trust, found that "87 percent of the scholarship students helped by 18 school tuition organizations were already enrolled in private school before the aid." *Id.*

• Arizona tax credits have "largely failed to expand access to private education for low- and middle-income families, as lawmakers promised . . . [and] blatantly violate the few regulations that lawmakers included in the statute . . . ." Ryan Gabrielson, *School Tuition Organizations Unaccountable*, E. Valley Trib., Aug. 1, 2009. eastvalleytribune.com/story/142256.

• A majority of tax credit donations are "earmarked to give scholarships to students already enrolled in private

schools, no matter how much money their parents earn." Ryan Gabrielson & Michelle Reese, *Private School Credits Rife with Abuse*, E. Valley Trib., Aug. 2, 2009, *available at* 2009 WLNR 14919217.

- At two of the largest STOs, executives, one of whom is a member of the state legislature who has been the most prominent legislative proponent of the Arizona program, "have used tax credit donations to enrich themselves, buying luxury cars, real estate and funding their own outside for-profit businesses." *Id.*

- Some of the program's chief proponents agree that religious and other private schools "have used the infusion of millions of income tax dollars to increase tuition, rather than the diversity of their campuses." *Id.*

- Counsel of Record for amicus Goldwater Center, who was instrumental in establishing the Arizona program, has concluded that "This is horrible. . . This is not the program I fought for." *Id.*

After these articles were published, legislative task forces were established. See Ryan Gabrielson, *Lawmakers Call for School Tax Credit Probe*, E. Valley Trib., Aug. 11, 2009, www.eastvalleytribune.com/story/142824. No relevant

legislation had resulted at the time this brief was written. The "reform" proposal that seems to have the greatest chance of enactment at the current legislative session would remove the requirement that payments to STOs be made during the calendar year for which a credit is claimed, and permit taxpayers to wait to make those payments until they file their tax return for that year. See S.B. 1274, 49th Leg., 2d Reg. Sess., Senate Engrossed Version.

The Decision Below

Respondents' district court complaint asked that the Director of the Arizona Department of Revenue be prohibited in the future from awarding tax credits for payments to STOs that award scholarships on the basis of religion, or that award scholarships usable only at religious schools. The Director moved to dismiss for lack of federal jurisdiction. The district court granted the motion. The court of appeals reversed, *Winn v. Killian*, 307 F.3d 1011 (9th Cir. 2002), and this Court affirmed, *Hibbs v. Winn*, 542 U.S. 88 (2004).

On remand, the district court permitted intervention as defendants by Arizona Christian School Tuition Organization (ACSTO), the state's largest STO, and the Arizona School Choice Trust, a non-religious STO. All three defendants moved for dismissal on the ground that the complaint did not state a claim upon which relief could be granted. The district court again dismissed, *Winn v. Hibbs*, 361 F.Supp. 2d 117 (D.Ariz. 2005), and the court of appeals again reversed, *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002 (9th Cir. 2009). No temporary or

preliminary injunctive relief has been requested by respondents at any stage of the litigation, and none has been given.

Judge Fisher's opinion for the unanimous court of appeals panel holds that respondents' allegations that Arizona's tax-credit funded scholarship program "lacks religious neutrality and true private choice in making scholarships available to parents" are "sufficient to state a claim that Arizona's private school scholarship tax credit program, as applied, violates the Establishment Clause of the United States Constitution." Petition in 09-987, 3a. Respondents' allegations, if proved, could show that defendants' claim "that Section 1089 was enacted primarily to provide Arizona students with equal access to a wide range of schooling options" was "a pretense." *Id.* at 19-20a. In addition, "if plaintiffs' allegations are accepted as true, Section 1089 violates the Establishment Clause by delegating to taxpayers a choice that, from the perspective of the program's aid recipients, 'deliberately skew[s] incentives toward religious schools.' " *Id.* at 21a. Such a program would channel "a disproportionate amount of government aid to sectarian STOs, which in turn limit their scholarships to use at religious schools . . . requiring parents who would prefer a secular private school but who cannot obtain aid from the few available nonsectarian STOs to choose a religious school to obtain the perceived benefits of a private school education." *Id.* at 21a-22a. A reasonable observer could also "conclude that the aid reaching religious schools under this program 'carries with it the *imprimatur* of government endorsement.' " *Id.* at 22a. Rehearing *en banc* was denied, with eight

dissents. *Id.* at 62a.

ARGUMENT

The decision below does not conflict with the decision of any other court of appeals or with the decision of the highest court of any state. It is a fact-specific interlocutory ruling that concerns the administration of an unusual Arizona program that uniquely combines a failure to serve a significant secular purpose with a lack of religious neutrality. If the Arizona program operates as respondents allege that it does, respondents contend that it would violate the Establishment Clause. The decision below holds that respondents should have an opportunity to prove the truth of their factual allegations. Preliminary injunctive relief has neither been requested nor issued, and the pendency of this litigation threatens no school-choice programs in other states. There is no occasion for the Court's review of this unexceptionable ruling.[4]

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[4] Petitioner ACSTO contends that respondents lack standing because Arizona's allegedly unconstitutional expenditure of tax revenues occurs before, rather than after, the revenues reach the state treasury. Petition in 09-987, 5-21. This odd contention has no merit. Taxpayer standing to challenge a state spending program as a violation of the Establishment Clause depends, not upon whether funds technically pass through the state treasury, but upon whether taxpayers have a "financial interest that is, or is threatened to be, injured by the unconstitutional conduct." *Doremus v. Bd. of Educ.*, 342 U.S. 428, 435 (1952). If petitioner's standing contention were correct, taxpayers would not have had standing to bring the Establishment Clause challenges that were adjudicated on the merits by this Court in *Mueller v. Allen*, 463 U.S. 388 (1983) (tax deductions), *Walz v. Tax Comm'n.*, 397 U.S. 664 (1970) (tax exemptions), or *Comm. for Public Educ. &*

A. There is No Conflict.

Petitioners do not suggest the existence of a conflict between the decision below and the decision of any other federal court of appeals. Their contention is that the decision below conflicts with the decision of the Supreme Court of Arizona in *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999), *cert. denied*, 528 U.S. 921 (1999). That contention is incorrect.

Kotterman was a *facial* challenge to the Arizona program involved in this case. The *Kotterman* complaint was filed, and the case was decided, on the basis of the statutory text, before the program began full operation. The present case, by contrast, is an *as-applied* challenge, not to the statute's text, but to the program as it actually operates. The features of the program's operation that are the primary bases of respondents' challenge - - the award of scholarships that can be used only in religious schools by religious organizations, the effect of that religious discrimination on parental choice, and the failure of the program to achieve its purported secular objectives - - could not have been challenged in *Kotterman*. The *Kotterman* court actually appears to have expressly (and it turns out incorrectly) assumed that the Arizona program would be religiously neutral in operation. See *Kotterman*, 972 P.2d at 614: ("Every STO must allow its scholarship recipients to attend any qualified school of their parents' choice.")

Religious Liberty v. Nyquest, 413 U.S. 756 (1973) (tax credits).

B. Existing or Proposed School Voucher or Tax-Credit Programs in Other States Are Not Affected by the Decision Below.

Petitioners suggest that the decision below casts a "constitutional cloud" on school-choice programs in other states. See Petition in 09-991, 30-31; Petition in 09-988, 34-35. That "cloud" is imaginary. The programs in other states to which petitioners refer do not contain the religiously discriminatory practices that make the Arizona program unconstitutional.

In 2009, the United States Department of Education issued a Report on existing state voucher, tuition tax-credit and similar school-choice programs in the United States. See U.S. Dept. of Educ., *Education Options in the United States, State Programs that Provide Financial Assistance for Attendance at Private Elementary or Secondary Schools* (2009). The Report lists twenty-six such programs in fourteen states and the District of Columbia. Only five of these twenty-six programs - - those in Florida, Georgia, Iowa, Rhode Island and Pennsylvania - - use tax credit systems at all similar to the Arizona program. All but one of these five programs contain, as the Arizona program does not, provisions that prevent the award of scholarships on the basis of religion, that prevent the award of scholarships usable only at religious schools, that preserve parental free choice in the use of scholarships, and that ensure that the program serves a significant secular purpose.

Following are brief descriptions of the five programs in other states to which petitioners refer:

- The Florida Tax Credit Scholarship Program, Fla. Stat. Ann. § 220.187 (2009), provides scholarships for students who are in foster care, or for students with financial need who are not already attending private school. Florida employs three non-governmental STOs to award these scholarships. None is a religious organization. Florida's statute does not permit STOs to "restrict or reserve scholarships for use at a particular private school" and requires that STO scholarships allow a parent to transfer a scholarship during a school year "to any other eligible private school of the parent's choice." Although Florida has joined in an amicus brief supporting petitioners in this case, its program is clearly not called into question by the decision below, and the amicus brief does not suggest otherwise.

- Rhode Island's Business Entity Scholarship Tax Credit Program, R.I.Gen.Laws §§ 44-62-1; 44-62-2 (2009) provides scholarships only for students from low-income families. Only business entities may use the credits - - individual taxpayers may not. Taxpayers who take the tax credit may not designate funds for any student or any school. Rhode Island, like Florida, has three STOs, none of which is religiously affiliated. Rhode Island has not joined the amicus brief filed by eight states in support of the Petition in 09-991.

• The Iowa STO program, Iowa Code § 422.11S (2010), authorizes scholarships only for students from low-income families. Unlike Arizona taxpayers, Iowa taxpayers must contribute their own funds in order to be able to claim a credit. Iowa taxpayers also may not designate students as scholarship recipients and Iowa STO scholarships must allow students "to attend a qualified school of their parents' choice." Iowa has not joined the eight-state amicus brief.

• Pennsylvania's Educational Improvement Tax Credit Program, 24 Pa.Stat.Ann. 20-2001-B *et seq.*, awards scholarships only to students from low-income families. It includes grants for parental expenses in public as well as private-schools, and also includes direct grants to public schools for innovative educational programs. Pennsylvania has joined the amicus brief in support of the Petition in 09-991. That brief, however, does not explain how the Pennsylvania program would be endangered by the decision below.

• The only state program that closely resembles Arizona's in structure is a Georgia program adopted in 2008. Ga. Code, Ann. §§ 20-2A-1, 48-7-29.16 (2009). Data regarding the first year of the Georgia program's operation was not yet available when this brief was written. The Georgia statute, like Arizona's,

requires that STOs "allow students to attend any qualified school of their parents' choice." Georgia may, unlike Arizona, enforce this requirement. Georgia has not joined the eight-state amicus brief. Except for Pennsylvania, none of the states that have joined that brief has a school-choice program that could conceivably be jeopardized by the decision below.[5]

If the Arizona Legislature were interested in supporting non-public education through tax credits in a religiously neutral manner, nothing in the decision below would prevent it from doing so. Both Florida and Rhode Island have established religiously neutral

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[5] Petitioners also refer to a "cloud" over legislation that has been introduced in California, Montana, Nevada and Oregon. None of those proposals resembles Arizona's program and none would apparently contain the unconstitutional features of the Arizona program. With regard to the issues in the present case, the California proposal would require that scholarships be "portable during the school year and may be used at any qualified school that accepts the eligible student according to a parent's wishes." Assembly Bill 279, 2009-2010 Reg. Sess., § 3(d)(8); the Montana proposal would prohibit STOs from limiting scholarships to a "group of affiliated schools," S.B. 342, 61st Leg., Reg. Sess. §1 (3)(c); the Nevada proposal would require STOs "to allow a child to attend a qualified school which is chosen by a parent or legal guardian of the child" and would prohibit STOs from designating the school at which a scholarship could be used, S.B. 289, 75th Leg., Reg. Sess., §§ 4(2), 6(1); and the Oregon program would credit "expenses actually paid or incurred during the tax year on behalf of an eligible student of whom the tax payer is a parent" and provide scholarships only for "low-income eligible students or eligible students with special needs." H.B. 2754, 75th Leg., Reg. Sess. § 3(2), (1)(g)(B) (Or. 2009). None of these proposals had been reported out of committee when this brief was written.

tax-credit programs that use non-religious school tuition organizations to award scholarships. That religiously-neutral option is available to Arizona. Intervenor Arizona School Choice Trust, for example, is a large, non-religiously affiliated STO that was instrumental in the initial enactment of the Arizona program and that awards scholarships without reference to religion. Arizona's insistence on continuing to use religious organizations to award scholarships that can only be used at religious schools supports respondents' contention that religious neutrality and full parental choice are not objectives of Arizona's program.

C. The Decision Below is Clearly Correct.

The opinion in *Zelman v. Simmons-Harris* summarized its reasons for decision in the following language:

> In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.

536 U.S. 639, 662-663 (2002) It is clear that the

individuals "defined only by financial need and residence in a particular school district," to which this language refers - - the individuals who are entitled to "genuine choice" - - are the parents of children seeking vouchers, not taxpayers without children who are permitted to influence parental choice under the Arizona program. It is also clear that the *Zelman* Court believed that, to survive Establishment Clause scrutiny, the *Zelman* program had to be "entirely neutral with respect to religion," not only in theory, but in the way vouchers were actually awarded.

If respondents' allegations are true, the Arizona program fails to meet every one of the *Zelman* standards. In opposing certiorari, petitioners and their amici either misstate the way the Arizona program actually operates, misunderstand the meaning of the opinion below, or misperceive both of these things. Arizona's program is clearly not, for example, a program of private charity. It is a *state* program that uses *state* tax revenues to serve the *state's* purported educational purposes. No private charitable contributions are involved. Nor is the decision below based on the fact that most Arizona program scholarships are used at religious schools. It is based on the allegations that the majority of Arizona's scholarships are *awarded* to parents on the basis of religion by the organizations that the state has empowered to grant the scholarships, that those awards *require* parents to send their children to religious schools, and that the Arizona program is not designed to serve, and does not in fact serve, its purported non-religious purposes.

Petitioners' basic contention appears to be that,

so long as the Arizona program is religiously neutral *on its face*, it passes constitutional muster, regardless of how it might lack religious neutrality in actual operation. If the court below had agreed with this argument, it would have committed error. Constitutional protections, including the Establishment Clause, are concerned not solely with facial neutrality. They are concerned with how government programs actually function. If respondents are given the opportunity to prove the truth of their factual allegations, they will show that the Arizona program functions in disregard of the Constitution's requirements that state-funded scholarships be awarded without reference to religion, and that parents - - not STOs and taxpayers - - have the right to choose where those scholarships will be used.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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